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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

EMPIRE HEALTHCHOICE ASSURANCE, INC.,
doing business as Empire Blue Cross Blue Shield,

Petitioner,

v.

DENISE FINN MCVEIGH, as administratrix of
the Estate of Joseph E. McVeigh,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal question jurisdiction exists over a suit by a federal government contractor to enforce, on behalf of the United States, a provision in a health benefits plan for federal employees that is part of a government contract established pursuant to the Federal Employees Health Benefits Act.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are identified in the case caption.

STATEMENT PURSUANT TO RULE 29.6

Empire HealthChoice Assurance, Inc., doing business as Empire Blue Cross Blue Shield, is wholly owned by WellChoice, Inc. through WellChoice Holdings of New York, Inc. WellChoice, Inc. is a publicly traded company, and no publicly held company owns ten percent or more of its stock. Neither Empire HealthChoice Assurance, Inc., nor WellChoice Holdings of New York, Inc., is publicly traded.

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Empire HealthChoice Assurance, Inc. ("Empire") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 396 F.3d 136. The opinion of the court of appeals denying petitioner's petition for panel rehearing (Pet. App. 46a-51a) is reported at 402 F.3d 107. The order of the court of appeals denying petitioner's petition for panel rehearing and for rehearing en banc (Pet. App. 52a-53a) is not reported. The opinion of the district court is not reported but can be found at 2003 U.S. Dist. LEXIS 16276 (Pet. App. 54a-62a).

JURISDICTION

The judgment of the court of appeals was entered on January 14, 2005. Petitioner timely filed a petition for rehearing and for rehearing en banc. The court of appeals denied the petition for rehearing and for rehearing en banc on May 10, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Employees Health Benefits Act, 5 U.S.C. §§ 8901-8914, provides in pertinent part:

5 U.S.C. § 8902(a):

The Office of Personnel Management may contract with qualified carriers offering plans described by section 8903 or 8903a of this title, without regard to section 5 of title 41 or other statute requiring competitive bidding. Each contract shall be for a uniform term of at least 1 year, but may be made automatically renewable from term to term in the absence of notice of termination by either party.

5 U.S.C. § 8902(d):

Each contract under this chapter shall contain a detailed statement of benefits offered and shall include such maximums, limitations, exclusions, and other definitions of benefits as the Office considers necessary or desirable.

5 U.S.C. § 8902(m)(1):

The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

STATEMENT

In this action, a divided court of appeals held that the federal courts lack subject matter jurisdiction over a suit to enforce the terms of a health benefits plan governed by the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901-8914. The suit was commenced by Empire, which administers, in parts of New York, the largest plan in the FEHBA program: the Service Benefit Plan (or the "Plan"). Local Blue Cross and Blue Shield entities, including Empire, administer the Plan in their particular localities pursuant to a federal government contract entered on their behalf by the Blue Cross and Blue Shield Association ("BCBSA") with the United States Office of Personnel Management ("OPM"). The Service Benefit Plan provides health benefits to over 4 million federal employees and annuitants and their dependents. Overall, approximately 8.5 million individuals obtain health benefits coverage through FEHBA-governed plans.

The particular Service Benefit Plan terms involved in this controversy concern reimbursement of benefits. Reimbursement is a species of subrogation and arises when the Plan has paid benefits to an enrollee for injuries and the enrollee then also collects from a third party in connection with those same injuries. In such circumstances, the Plan's provisions mandate

that the enrollee must reimburse the Plan for the benefits it has paid.

Here, after Empire brought suit to enforce the reimbursement terms against the estate of an enrollee who refused to comply with those terms, the court of appeals rejected federal question jurisdiction. It did so notwithstanding that the money collected through reimbursement inures to the benefit of the United States, the reimbursement terms were promulgated by OPM and are part of the government contract with BCBSA, FEHBA contains a broad preemption provision displacing state law that relates to health benefits, and other courts of appeals have reached the opposite result on the same issue. The Court should grant the petition for certiorari to resolve the resulting conflict in the circuits and to correct an erroneous decision that threatens turmoil in a significant national federal program.

A. The Statutory, Regulatory, and Contractual Scheme

1. *The Service Benefit Plan.* Congress enacted FEHBA in 1959 to provide "a measure of protection for civilian Government employees against the high, unbudgetable, and, therefore, financially burdensome costs of medical services through a comprehensive government-wide program of insurance for federal employees . . . , the costs of which [would] be shared by the Government, as employer, and its employees." H.R. Rep. No. 86-957, at 1 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2913, 2914. Overall, Congress sought to "assure maximum health benefits for employees at the lowest possible costs to themselves and to the Government." *Id.* at 4, *reprinted in* 1959 U.S.C.C.A.N. at 2916.

To achieve these goals, FEHBA delegates expansive authority to OPM. The statute "'gives OPM the authority to administer the program by contracting with qualified private carriers to offer a variety of health care plans, 5 U.S.C. § 8902, distributing information on the available plans to eligible employees, [5 U.S.C.] § 8907, by promulgating necessary regulations [5 U.S.C.] § 8913, and by interpreting the plans to